

## Commentary by Professor Henry Shue\*

I would like to contemplate three constructive suggestions for this probing, thoughtful, and modest set of reflections by the author. I hope that I have correctly understood your paper so that my suggestions will be helpful.

1. Sharply distinguish between:
  - a. Aiding a potential client suffering extreme distress by providing therapy (therapy provision or 'aid-1')
  - b. Aiding a (now accepted) client by providing an expert report in support of asylum (asylum support or 'aid-2')

On occasion, when comments are made or questions are raised about "assisting" or "aiding" a person, it is not clear whether the reference is to aid-1 or aid-2. Evidently, I am assuming that giving therapy and composing a report for an asylum application are distinct from each other, hence the organization could hypothetically fulfil aid-1, whilst refusing to fulfil aid-2 for that same person. If this assumption is mistaken, this is not a helpful suggestion.

An advantage of being consistently aware towards such distinction is that it clarifies which dilemma a particular argument is relevant to. For example, perhaps the most powerful argument in the paper is that "*We have to choose whose side we work on, and working on the victim's side sometimes requires assuming that the victim...can indeed be a perpetrator...Choosing*

*this framework implies the understanding that the first victim to be aided is the one in front of us*" (second order dilemma). This is a compelling consideration in favor of aid-1, however not a very strong – and certainly not a decisive – consideration in favor of aid-2. Despite this, it seems to be presented in the paper as justification for taking a position on aid-2.

The following is my explanation.

First order dilemma (see Table 1) states "*Should a pro-bono NGO do a forensic assessment of a highly probable perpetrator that alleges to have been tortured him/herself to claim for international protection?*" As presented, this dilemma relates to aid-2 – preparation of an expert report to support an asylum claim. When proceeding to present the "resolution" of this first order dilemma, the argument is as follows: "In this situation, our first obligation is to the client. Our stance must be therapeutic, not judgmental. Therefore, this involves ensuring that these clients receive equal treatment..." This argument is in support of aid-1, providing therapy where there is severe distress. That the potential client "comes to us in a severe distress condition" is indeed a strong reason to carry out the "deontological duty" of care, that is, to provide aid-1. However, the first order dilemma is not about whether to provide therapy. Conversely, it regards whether to prepare a report in support of asylum, that is, conducting a forensic assessment in support of asylum. As indicated above, providing aid-1 is not a reason for providing aid-2. Therefore, unfortunately, the reasons provided to the "resolution" of the first order dilemma, seem largely irrelevant to that dilemma (and decisive regarding dilemma 2d).

As I have previously mentioned, I am assuming that one option would be to provide therapy, thereby assisting in reducing the clients' extreme stress and fulfilling the duty

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of care. Simultaneously, this option allows non-acceptance of the client (if, for example there is clear evidence he is an active perpetrator) and refusal in conducting a forensic assessment supporting asylum. Provided that aid-1 and aid-2 are separate matters, and it is possible to say yes to one and no to the other; reasons for one are not reasons for the other. In other words, a duty of care is not a reason to advocate asylum, but it *is* a reason to provide therapy. Nevertheless, there are certainly individuals who ought to receive therapy (because they had been tortured) however were directed to authorities for trial after committing torture, or were still actively involved in torturing, as was the scenario in Case 3.

2. Sharply distinguish between:

- a. The issues that arise *before* the decision to accept the person as a client, and
- b. The issues that arise *after* the decision to accept the person as a client.

It appears to me as if the main discussion about whether the potential client is also a perpetrator falls under second order dilemmas. This category was where I perceived before and after as being collapsed together. The reasoning in the paper is “*trust is a necessary pre-condition to work in the forensic assessment of an alleged victim. Moreover, trust and confidence are complex matters assuming our impartiality ....*”. These considerations apply, however, *after* the decision has been made to accept the person as a client and to work with him on a forensic assessment that may support the asylum application. Such considerations are not reasons for why you should trust him, or that he trusts you, *before* you have decided to accept him as a client. Consider, if you were impartial to all potential clients, you could only either accept all or reject all. If you are

to accept some and reject others, an inquiry is necessary, if not an investigative, preliminary stage.

I realize that a client could not reasonably trust you if you continued to investigate his prior behavior (is he a torturer) *after* you have started work on the forensic assessment (has he been tortured). However, he cannot expect you to immediately and automatically accept him *before* you have chosen to take him as a client, and you have no reason to be impartial until you have chosen to enter that relationship. I realize that you cannot launch an investigation in his country of origin as it could endanger him. Nonetheless, *before* your task turns to determining whether he has been tortured, there is no reason why you cannot discreetly and carefully attempt determination on whether he is a torturer using general information available. Your choice is to decide whether the available evidence is conclusive, highly probable, or not-so-highly probable that he is a torturer before you choose to launch any forensic investigation.

If you were to conduct an inquiry about whether he was a torturer, prior to making the decision to accept him as a client, affect his ability to trust you post-acceptance? You are the expert on that, is the separation of *before* and *after* psychologically unrealistic? I do not think so, however, post-acceptance you could open a dialogue with him along the lines of “until now we have not developed a trusting relationship because we first needed to determine whether you were an eligible client. We are now finished with that decision and are committed to helping you. We are trusting that you deserve our help, and that you too, can trust us - we are now on your side and will try to help you gain asylum.” Could this be realistic?

I would also like to mention a couple of issues about the conclusions, or “proposed cri-

teria” in Table 2. From my position, I take proposed criteria one and two to be the main answers for the first order dilemma about aid-2, support for asylum. Regarding criterion one, it is useful to note that different cases emerge. The statement made in the beginning on first order dilemma asked about “a highly probable perpetrator”, however criterion one in Table 2 references “conclusive evidence”. Probable and conclusive are two different situations, whereby conclusiveness is much easier to deal with. The discussion mentions “*clients who admit to being complicit in torture*”, and Case 3 of the informer for the para-police “*showed our staff photographs he has recently sent via WhatsApp of potential targets*”. Presumably, this would be an example of a conclusive case by which the client has admitted involvement. Although am I correct in presuming that implicating oneself like this is relatively rare?

In any case, the original, more difficult question regarded cases of “highly probable” yet not conclusive. I consider one kind of highly probable case as presented in criterion two “*potential clients that are claimed by a national or international Court*”. Perhaps a claim by an international court would usually count as conclusive, or sufficiently highly probable. What do you say about national courts in contrast with international? Consider circumstances where a national court is a part of a dubious regime that might, as alleged by the potential client in Case 1, have ulterior motives for framing political enemies? Aren’t you forced to make an independent judgment of your own about whether to accept the courts charge based on whatever general knowledge you have about the government in question?

Criterion three in Table 2 is a widely understood and shared legal requirement that is not at issue (even though the Trump Admin-

istration in the US is currently blatantly and flagrantly violating it). One clarification that is needed concerning *refoulement* is to be explicit about the answer to the question: do you consider refusal of providing an expert report in support of asylum as a case of ‘contributing’ to *refoulement* in a manner prohibited by criterion three? I would not, as refraining from helping is different from harming, but I think your position needs to be clear.

3. Apply the conclusions reached to each of the three illustrative cases in order to explain how the criteria help to resolve each case. It is very helpful to have the three cases, but it is a lost opportunity if you do not return to them and illustrate how the discussion helps with each. This concrete application will make the meaning of the criteria adopted much clearer.